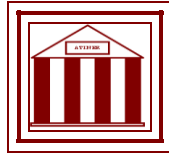


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A Moveable Feast or the End of
Harm?**

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Inchoate Offences in Cyberspace – A Moveable Feast or the End of Harm?

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Abstract

This paper is intended to draw attention to the number of criminal offences – in English law specifically, but also more generally – that can now be committed without harm or the risk of harm to putative ‘victims’. It will be argued that traditional inchoate offences have been expanded into what may be termed ‘super-inchoates’ by reference to the expanded distance between perpetrator and the intended harm via the internet. As the very idea of cyberspace challenges the perceptions of proximity which have been the ideology behind the traditional inchoate offence, this paper will begin to ask whether the expansion of the criminal law in this way is ultimately a symptom of overcontrol by the State driven by a culture of fear in the post-modern society, and whether we are ultimately any safer as a result.

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Introduction

While cyberspace cannot be a place without law and criminal liability is as capable of arising within its environs as anywhere else, it is in the use by the state of inchoate offences in this respect that may lead to accusation of overcriminalisation and drift into the ‘pre-crime’ agenda. Pre crime is the stuff of science fiction, of the idea that a person can be identified as a criminal before he commits the crime and can therefore be arrested before the harm is done to the victim, familiar to us through the film ‘Minority Report.’ In Hollywood the arrests occur before the defendant has any idea he will commit the harm, based on the foresight of supernatural creatures. In the real world the crimes are increasingly being committed on the grounds of what the defendant has said, where he is, or what information he possesses, where these things are seen to be a ‘risk’ to society.

In order to demonstrate, as far as time allows, I will take two examples of recent English legislation and draw a brief comparison between the old and new formats to illustrate the emergence of inchoate offences as an increasing fixture of the legal landscape. This rise in the amount of such offences is only complicated by the number of them that can be committed in cyberspace, even further distant from the harm that is risked. These statutes will be the Sexual Offences Act 2003 as compared with the SOA 1956 and the Fraud Act 2006 as compared with the TA 1968 and ‘78.

Theoretical framework?

The inchoate offences are named after the Latin ‘*Inchoatus*’ and refer to the criminalisation of acts which while causing no harm in themselves, are part of the preparation of a criminal harm. The most common in English law are conspiracy, an agreement to commit a crime, incitement – encouraging another to commit a crime, attempt – trying to commit a crime but failing for some reason, and assisting and encouraging a crime under the Serious Crime Act 2007. The inchoates are either an essential part of criminal justice, or a way to meter out expensive, unjustified and overinclusive punishment, depending on what society is expecting the criminal law to do, and why.

A popular theory of criminalisation is rooted firmly in the requirement of harm prevention. If the rationale of the criminalised act is punishment of the harm inflicted upon the victimised individual, the lack of harm inherent in an inchoate offence should take such an action outside of the criminal law altogether. There are however sound arguments for including inchoates within the lexicon of the criminal law, if the criminal law is supposed to protect the wider concept of society from harm, including the possibility of as yet unrealized harms, then the importance of the inchoate offence as an essential weapon in the criminal arsenal comes into focus. An arrest and conviction for such an offence allows the justice system not only to circumvent the harm that would have been committed by the actor on his victim, but has – in a wider

sense – protected society from the imposition of another criminal statistic over which that society increasingly feels it has lost control.

Other theories though are not so supportive. An economic theory of criminalization takes efficiency as the basis for the state's criminal prohibitions. This theory argues that the Market is the most efficient way to allocate resources amongst a population, as those who want a resource the most will work hardest to get it. Crime then undermines that efficiency by redistributing resources to those that have not worked in the traditional sense in order to earn them. The economic theory would seem to render the idea of an inchoate offence redundant. If the resource was not actually reallocated, regardless of the intent of the actor, then there is no need for state punishment. This supports the harm centered view of criminalization, that actors should be punished only for their harmful acts.

An increasingly popular theory of criminalization in the post modern society is Legal Moralism - where, irrespective of harm caused, a person's immoral act – in the sense of culpable wrongdoing – is sufficient to justify the enactment of criminal law and the punishment of violators of that law. It is easy to see here that the idea of an inchoate offence is very attractive to this theory. Legal moralism would agree that an inchoate offence should be treated the same as the completed crime as the culpability of the actor would be the same in spite of his lack of success. This supports the Culpability centered view of criminalization, that an actor should be punished for what he intends to do.

It is clearly impossible to equate culpable wrongdoing with harm in any sense. Each of these two concepts can exist quite happily without the other. Therefore if Society is taking an increasing moralistic stand on what it chooses to criminalise then the rise in inchoate offences, even very early forms of such offence, are easier to understand. Wrongdoing in most of the inchoate offences is easy to pinpoint – the MR requirement usually demands intention to harm, although more frequently now in statute the concept of recklessness creeps in, another broadening of the inchoate spectrum - But if we want the criminal law to proscribe wrongdoing we inevitably need a discussion on what we mean by wrong. This question is something which I cannot take any further here.

The position of inchoates within the criminal justice system is therefore open to debate based upon the role that the system is expected to play. Legal moralism demands actors are punished for their evil intent alone, economic theory rejects them as superfluous. The theory of harm prevention, a very prevalent one in the society in which we live, is dangerously ambiguous. Once the criminalization of an act is dependent upon it causing harm, there must be a definition of what harm is in order for the process of criminalization to be justified. The way this definition has developed, and is still developing is set out below, and it sees scholars and commentators stretching the credibility of the word harm to beyond what might be thought of as its wildest limits. The problem of the point of criminalization has been tackled by the brightest minds and still the point is uncertain, another issue which will not be resolved here, but without a theory of criminalization there is no standard against which to set the exploration of the inchoates as the legitimate offspring of that theory.

Therefore it is initially from the position of the criminal theory of harm prevention that the following proceeds.

Inchoate offences

A very basic look at academic theories is instructive in revealing the complexities and lack of clarity in even identifying what an inchoate offence is – irrespective of what it is designed to do. Even within the established classification of such offences, disparities between the different liabilities arise. The liability for an attempted crime is probably the best made out, especially a complete attempt where the mens rea is present and a person had tried their hardest to bring about the actus reus. There is a large gap however between such an offence and criminal liability for the statutory incitement of a substantive offence or assisting and encouraging crime under s44, 45 and 46 of the Serious Crime Act 2007. Apparently minor acts or trivial speech is here criminalised, irrespective – in the case of the SCA 2007 – of the assistance or encouragement having any effect, or even being heard or seen by the person the defendant wanted to assist or encourage.

The application of inchoate crimes to cyberspace raises additional uncomfortable questions, in giving an extra distance between the substantive crime and the new inchoate on the statute book. Zedner¹ talks of this as the concept of ‘pre-crime’, where a society seeks to identify and neutralize a potential threat before the threat has materialized into action which has caused harm or even, in many cases has developed into what could reasonably be called a risk. These new forms of crime may be termed ‘super-inchoate’ offences.

Brenner² asserts that cybercrime introduces a new type of inchoate offence. Potential inchoates, she says, are a ‘new dynamic in cyberspace’. These ‘crimes’ relate to those who receive a fraudulent email, instantly recognise it for what it is and delete it – in these cases, there is *no risk* that the crime will be committed - or those who read a post about how to hack a computer, make a bomb or commit suicide. This is where the present law can become unsure. The fraudulent email or the bomb making website is already a crime, the suicide website is probably not. Yet such a site could be said to be an attempt (or a conspiracy or an offence under the Serious Crimes Act 2010) to assist a suicide even if it was never accessed, if we take the culpability centered approach to inchoate liability. There would appear to be no reason to take the trouble to set up such a site if there was no intention that it should be read or acted upon. The harm centered view is also relevant here, many people – especially those who have lost loved ones after they have accessed such sites – feel that society is directly harmed by the presence of these sites on the internet.³ The definition of harm is one that has baffled criminal lawyers for a

¹ Lucia Zedner --- Pre-crime and post-criminology? Theoretical Criminology 2007 11:261

² Cybercrime Metrics – Old Wine, New Bottles? – Susan Brenner – Virginia Journal of Law and Technology (2004)

³ See Papyrus-uk.org/ a parents against web suicide sites group

long time, and although we can say that it is clear that an act which does no harm should not be criminalised, if we factor in indirect and societal harm there seems to be few actions a person can perform that are not – at least potentially – harmful. It does little good to try to balance the value of that action to society as against the potential harm to invoke a sense of proportion to the argument. If we take the example of the act of posting a list of ingredients needed for bomb making on-line, or the mock up of a ‘fraudulent’ – but incomplete – website, these items – and the possession of them – would be seen as no good what so ever to society, and therefore the ‘potential harm’ becomes metasized. Why have these items if there is no intent to use them for harm? Why publish the pro-suicide or pro-anorexia site if not for the same reason? Although it must be remembered that even here seemingly similarly harmful websites will fall to be considered very differently by the criminal law. Assisting a suicide is still a crime under the Suicide Act 1961¹, whereas being anorexic or encouraging someone to be so would not seem to be covered by any statute unless the Offences Against the Person Act 1861 can be stretched to include such things under the heading of greivous bodily harm. We must be able to reason as a society what harms we are willing to accept and what freedoms we are willing to give up to keep the ‘risk’ of those harms away. Claire Finklestein² even goes as far as to suggest that creating a risk of harm is harm in itself which should be punisheable under civil or criminal law as appropriate. She argues that seeing a ‘risk of harm’ as harm in itself could be a way to get over the discomfort lawyers and others feel about imposing liability where no ‘actual harm’ has occured. Her notion of ‘risk harm’ proposes that if the risk of harm is already a harm, then harm is in fact caused and punishment is deserved on that basis. She concedes this may be a difficult stretch for some, especially so – it might be considered – when she says that a person who flew on an airliner where an engine failed mid flight has been harmed by the increased risk of danger she was subjected to, even if the passenger does not know of the engine failure until she is safely inside the airport building. Although this does sound like stretching the limits of the criminal sanction to absurdity, if these ‘inchoate offences’ are acceptable, it may not be such a stretch to take this to a ‘super inchoate’ once further removed, catorgatisation and find fault liability where the passenger had no such knowledge and suffered no such harm – it is sufficient that there was a risk the harm might occur. This seems to tie in with Brenner’s idea of cybercrime metrics, and the person who deletes a fraudulent email as soon as it arrives in his inbox – a ‘potential inchoate’, has still been harmed and there is still a requirement that the action be criminalised

If the definition of an inchoate offence is difficult, bound up as it is with the *raison d’etre* of criminal law and the jurisprudential uncertainty of the concept

¹ Suicide Act 1961 s2

² Is Risk a Harm? – Claire Finklestein, University of Pennsylvania Law Review Vol 151 No 3 Jan 2003 pp 963 - 1001

of harm, the introduction of potential inchoates in cyberspace could be seen to exacerbate the problem greatly.

There is nothing to suggest however, that a base reading of the differing definitions should not be taken as a standard. An offence is inchoate where it has not caused physical damage to a person or property, so acts which require this damage – all of the result crimes and some of the conduct crimes – can instantly be disregarded. An inchoate offence must also have a criminal heritage, so if there is no proscribed offence, then there can be no inchoate species of that act – the consummate harm requirement. Beyond these very basic issues the definitions begin to break down, but there is nothing to suggest that all inchoates are equal. It may be possible to identify and classify separate genera of inchoate offences which deserve differing responses in an enquiry into their use and reach.

At the top of this list would be what the legislature calls the preparatory offence. This is an offence committed which is criminal in its own right and can be charged as such, but is made more culpable by the defendant's intention to commit another criminal action as a result of the first. An example might be taken from the Computer Misuse Act 1990 (as amended)¹ where s1 prohibits unauthorised access to a computer, and s2 prohibits unauthorised access to a computer with intention to commit a further offence. Although the first harm has already occurred, the charge will be based on the harm that has not yet been committed otherwise s1 would have been the appropriate charge to bring. Attempted crimes might be the closest forms of the 'traditional' (common law) inchoate offence to the actual harm, when the most complete AR and MR has been performed. The attempted crimes may not even be fully inchoate if the literal meaning of the word is taken. The attempts may be termed as semi-inchoates as they are much closer to the consummate offence. An initial genera of the offences would split the inchoates into five families

Inchoates plus - Preparation offences

Semi Inchoates – Attempts

Inchoates – conspiracy, incitement, assisting and encouraging

Super inchoates – Any of the above further distanced by cyberspace

Potential inchoates – Following Brenner

It might also be suggested that the criminal justice system would be cheaper, less complicated and most importantly more just, if we accept the straightforward unconstitutionality of all of the inchoate offences with the exception of attempt, protected as it is by the actus reus requirement of 'an act beyond that which is more than merely preparatory to the commission of the full offence'.² Other offences, even those of long standing in the criminal law such as conspiracy or incitement to murder may be seen to fail even a generous

¹ CMA 1990 as amended by the PJA 2007

² S1 (1) Criminal Attempts Act 1981

interpretation of the requirements of theories of criminalisation with the possible exception of legal moralism.

Example one – The Sexual Offences Act 2003

The Sexual Offences Act 2003 (SOA) was passed following the Government's publication of the White Paper entitled '*Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences.*' The Act contains 16 sections that give rise to offences that may be labelled inchoate. (See Table 1.)

Seven of these come under the remit of 'causing or inciting' a certain action, such as s8, causing or inciting a child under 13 to engage in sexual activity. These offences in themselves are an odd concept. It seems strange to couple the two very different acts and potential outcomes together. In legal language, to cause an event means the event must have happened. Although common law incitement has now been abolished under s59 of the Serious Crime Act 2007, the definition and limits of statutory incitement remain. Incitement has been held to encompass threats or pressure to do a certain thing as well as encouragement. Although the incitement has to be heard by the incitee, there is no requirement for the incitement to have any effect on the person incited. This is therefore a very 'early' form of inchoate offence, in essence only speech, although of course there is a mens rea requirement of the intention that the ultimate offence take place. Could it be said that the level of culpability in these two outcomes is similar? There is one offence simply of inciting, s26 – inciting a child family member to engage in sexual activity. Presumably the common law definitions of incitement will also apply here. There are three offences of facilitation or arranging, the commission of a child sex offence (s14), and three offences of 'trafficking' under ss57,58 and 59, none of these sections require the ultimate offence to actually happen as long as the defendant believes that it is likely.

There is one offence of trespass with intent to commit a sexual offence (s63). The s66 offence of Exposure may also be termed inchoate, as it is not necessary for anyone to have actually seen the exposed genitals, or, if they have, to have been alarmed or distressed by them. Section 15 introduces a new offence of 'meeting a child following sexual grooming', where the wording is 'meeting or travelling to meet a child having been in contact with them on at least two occasions and with intention to commit a relevant offence.' The Explanatory notes specifically mention the contact could include 'communications on the internet'. The eight incitement offences could easily be committed in cyberspace alone, as could exposure – via a webcam – the facilitation offences, the contact required by s15 and of course, the making of indecent images of children. The only one of these 16 that seems incapable of being committed in cyberspace is s63, trespass with intent to commit a sexual offence. S63 is grouped in the part one index as a 'Preparatory offence' along with administering a substance with intent (s61) and committing an offence with intent to commit a sexual offence (s62).

There are 65 criminal offences within the SOA 2003 which means that nearly a quarter of these offences (24.6%) are inchoate to various extents, but each specifically needing no harm to occur to the 'victim' or even of the intended 'victim' being aware that they were so viewed. If the 'preparation offences' are included this percentage rises to over 29%.

It is instructive to compare these statistics from the SOA 2003 with its predecessor, the Sexual Offences Act 1956. (See Table 2).

There are 36 offences in the SOA 1956, nine of which could be carried out with no harm coming to the victims at all, this is 25% of the offences – comparable to the 2003 Act. If the preparation offences are included, where a harm has already been committed with intent to commit a further harm which is not yet realised, this percentage rises to 50%, well above the number in the later statute. This may suggest that the trend expected, that of the rise in the inchoate offence, is not made out. It might be helpful then to look at the language used to express the offences listed.

The word incitement does not occur in the 1956 Act at all, instead being replaced by 'encouraging', a word included in the common law definition of incitement anyway. A big difference between the two sexual offences acts is in the number of preparation offences. Here a harm *does* occur, but the crux of the offence is not that harm, but the intention of the defendant to commit another harm by virtue of the first. An example can be found in s2(1) of the 1956 Act,

'It is an offence for a person to procure a woman, by threats or intimidation, to have unlawful sexual intercourse in any part of the world.'

Simple procurement – or 'producing by endeavour' – is quite capable of being an inchoate offence, there is no need for the person procured to be harmed, or even to know he or she is being 'procured'. If this state of affairs is brought about by threats or intimidation however, a harm is committed by anybodies standard, irrespective of what happens to the person afterwards. In the 2003 Act, the largest number in the table (Fig. 4), consists of offences that can be committed by incitement. Thinking back to the genera of inchoate offences listed earlier, this would suggest that the timeline of criminal responsibility has been shifted backwards for a large percentage of the inchoates in the later act.

It is of very limited value to compare one statute to its predecessor of course, whatever the contrast. Social and moral mores change exponentially over nearly half a century, especially around the area of sexual proclivities, but the fact that criminality attaches to more behaviours that are more remote from the harm risked in the later statute may be the beginning of a trend.

The second schedule of the 1956 Act gives a table of punishments for the offences listed, and makes a clear distinction between sentencing for the commission of an offence, and the sentencing of an attempt to commit that offence. For instance, s5 – intercourse with a girl under 13 – gives a maximum penalty of life imprisonment for the substantive offence, and a mere two years for an attempt to commit it. This is a recognition that the completed offence is more harmful than the attempt, and follows the Harm Centered view of criminality, that is the harm that is identified that should be approbated and

punished. If we accept that sexual intercourse with a girl under 13 is harmful to her, physically and mentally¹, it must be less harmful for her not to have had sexual intercourse, irrespective of any trauma that may still have been present as part of the attempted crime. Contrast this with s1(1) of the Criminal Attempts Act 1981, which

effectively ‘upgrades’ an attempted offence to the same status, as far as punishment is concerned, as the substantive offence. As mentioned previously, this follows the Culpability centered view of criminality, that a person should be punished for the wrongfulness of his actions coupled with his intentions, and - notwithstanding the discretion available to judges as regards sentencing of offenders – gives the potential of life imprisonment to a person convicted of attempting to commit s5 of the SOA 2003 (rape of a child under 13). As the harm to a child cannot possibly be equal in such a case of attempt as against the actual rape, it must be suggested that this offence, and many others, are feeling the effect of legal moralism leaching into our understanding of criminality. The Criminal Attempts Act 1981, now over thirty years old, came into being with the rise in moral individualism and the increasing rejection of the ‘criminal other’ charted by Garland². The CAA 1981, a very short and otherwise uncontroversial act can be seen as having a massive impact on the law of England and Wales through s1(1), a sleight of hand that has tipped the law of inchoate offences on its axis.

Example two – The Fraud Act 2006

Another recent update in the law can be found in the Fraud Act 2006. Of the five offences contained within the Act, only one requires harm to another person, that of ‘obtaining services dishonestly’ under s11. Fraud itself is now an inchoate offence in that it needs no gain or loss of property to occur, or even a person to realize they have been targeted. It requires the dishonest intention to gain or to cause loss, in the three circumstances set out in sections 2 – 4. These are by false representation, by failure to disclose information or by abuse of position. The concept behind the overhaul of the fraud legislation was the ineffectiveness of the previous law, the Theft Acts 1968 and 1978, to deal with internet fraud, relying as it did on the issue of deception. English case law makes clear that a machine cannot be deceived, and the relevant sections of the Theft Acts require that something be obtained with a causal link to the deception practiced. By contrast, fraud is complete upon the making of a false representation, where ‘making’ has a hugely wide definition. A fraudulent email for instance is criminalized before it is sent to anyone, at a stage where

¹ And it must be accepted that this has not always been the case historically, and is still not the case in some

cultures and legal systems. Margerat Beaufort was 13 when she gave birth to the son who would become Henry VII of England.

² *The Culture of Control* – David Garland, Oxford

an attempted crime is not made out, and conspiracy or incitement could not be charged for an individual acting alone.

These four totally inchoate offences replace the six consummate offences of deception under the Theft Acts, another shift away from harm, and away from a result crime, replacing these with conduct offences reliant to a great extent on unrealized harm and the intent of the defendant.

It is self evident that two examples are not conclusive of a trend either, but I could go on. The Terrorism Act 2006 contains 10 offences, 8 of which could be called inchoate in that they do not require harm to be concluded – these include encouragement of terrorism, under s1. This offence is made out whether or not someone is in fact encouraged to commit any such act, and one which requires a mens rea for the defendant of recklessness, not intention. The defence available is on the reverse burden of proof – another addition to many more recent legislative acts.

The Criminal Justice and Immigration Act under s63 prohibits the possession of ‘extreme pornography’ even when it has been produced consensually by actors, again subject to the reverse burden of proof, and the Coroner’s and Justice Act 2009 s62 applies to ‘prohibited images of a child’ except where a person can prove ‘legitimate reason’ to possess such an image. For clarity here, a prohibited image under s62 refers to a non-photographic image, so this is not the possession of something that directly or indirectly harms a living child. The offences of possession of an item are particularly troublesome. It is hard to say these offences are directly harmful, and it is hard to say that they are wrongful to the extent that they should be subject to criminal sanction. The mere collection of information and the holding of it in personal collections has traditionally been restricted to obscene materials, and these have been generously interpreted and acts that have proscribed them have been little used in English law in recent years. The primary good of the internet is the provision of information and it may be that some of it is ‘dangerous’ and that the law has just had to move to keep pace with this, but we should be careful.

Conclusion

This research is – in many ways – embryonic, but a pattern does emerge. When a democratic state moves into an agenda that increasingly criminalises actions that are not harmful and are not wrongful in a way that most people would recognize, thereby increasing the harm to society and the individual as they are criminalized and subject to punishment, we must ask how the position was reached. And begin to ask where it will lead.

Table 1. SOA 2003

Inchoate expression forming AR	Number of offences
Inciting	8
Facilitating	3
Trafficking	3
Exposure	1
Travelling to meet	1
Preparation offences	3

Table 2. SOA 1956

Inchoate expression forming AR	Number of offences
Procuring	4
Causing or encouraging	2
Allowing 'for the purpose of'	3
Preparation offences	9